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IN THE SUPREME COURT OF THE
UNITED STATES
October Term 1971, NO. 71-5379

JANE HEIDEL, individually and
on behalf of all others similarly
situated,

Appellants,

vs.

SUPREME COURT OF THE STATE
OF ARIZONA, etc., et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF ARIZONA

MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE MOTION TO AFFIRM

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MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE MOTION TO AFFIRM

Appellees in the above entitled case move to dismiss this appeal on the following grounds:

(1) The appeal is not within the jurisdiction of this Court because it was not taken in conformity to statutes and the rules of the Supreme Court pertaining to appeals, and

(2) The federal questions sought to be reviewed were not timely and properly raised, or

In the alternative appellees move to affirm the Lower Court's Orders on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to

need further argument.

STATUTORY PROVISIONS INVOLVED

A.R.S. § 12-120.31 states:

> Fees and costs in the court of appeals shall be the same as in the supreme court. Added Laws 1964, Ch. 102, § 1.

A.R.S. § 12-321 states:

> A. On appeal from the judgment or order of a superior court in a civil action, appellant, at the time of filing the record on appeal, shall pay to the clerk of the supreme court twenty-five dollars. Within thirty days after filing such record appellee shall pay to the clerk of the supreme court fifteen dollars, which shall be in full for all fees except those allowed by law.
>
> B. An applicant for a writ of mandamus, certiorari, quo warranto or other writ within the original jurisdiction of the supreme court, except a writ of habeas corpus, shall pay the clerk fifteen dollars at the time of filing the petition or application. Any party opposing the issuance of such writ shall pay

the clerk five dollars.

QUESTIONS PRESENTED

For the purposes of the Motions presented, appellees accept the questions presented by the appellant in her Jurisdictional Statement.

OPINION BELOW

No opinion was ever rendered by the Arizona Supreme Court in this case, or was an opinion rendered by the Arizona Court of Appeals.

STATEMENT OF THE CASE

On the 29th day of December, 1969, appellant filed suit in the Superior Court of Arizona against the Arizona State Department of Public Welfare concerning the constitutionality of certain regulations of the said Department. On

the 25th day of January, 1971, the Superior Court of Arizona granted the Department judgment. Thereafter, appellant proceeded in the Superior Court to perfect her appeal to the Court of Appeals. After the record of the Superior Court proceeding was received by the Clerk of the Court of Appeals, she requested appellant to pay the statutory filing fee of twenty-five dollars ($25.00) within 30 days from April 5, 1971. [See Appendix A of Appellant's Jurisdictional Statement].

Thereafter, on the 14th day of April, 1971, appellant filed a Motion for Leave to Appeal Without Prepayment of Filing Fees. [See Appendix B of Appellant's Jurisdictional Statement]. This Motion

failed to raise any constitutional challenge or issue regarding A.R.S. § 12-321. On the 16th day of April, 1971, the Honorable Levi Ray Haire, Chief Judge of the Court of Appeals, wrote to appellant's attorney that the filing fee must be paid but extended the time for payment until June 14, 1971. /See Appendix C of Appellant's Jurisdictional Statement/.

Subsequently, on April 30, 1971, appellant moved for rehearing and raised constitutional issues for the first time. /See Appendix D of Appellant's Jurisdictional Statement/.

On May 5, 1971 the Honorable Levi Ray Haire once again wrote to appellant's attorney informing him that a Motion for Rehearing was improper for the reason

that no Court of Appeals' decision had been rendered and further advised that the Court could not waive the filing fee. /See Appendix E of Appellant's Jurisdictional Statement/. Consequently, on the 11th day of May, 1971 appellant petitioned the Arizona Supreme Court for review. The Supreme Court declined review on the 25th day of May, 1971, but allowed leave to proceed by Special Action. /See Appendix F of Appellant's Jurisdictional Statement/. Appellant then attempted to file a Special Action in the Arizona Supreme Court requiring the Court of Appeals to entertain her appeal without paying the required filing fee. /See Appendix H of Appellant's Jurisdictional Statement/. This procedure requires payment of a fee of fifteen dollars which the appellant refused to pay.

For this reason the Supreme Court of Arizona refused to accept jurisdiction of appellant's Petition for Special Action. /See Appendix I of Appellant's Jurisdictional Statement/.

On the 18th day of June, 1971 appellant filed a "Notice of Appeal to the Supreme Court of the United States" in the Arizona Supreme Court. /See Appendix J of Appellant's Jurisdictional Statement/.

Finally, on the 15th day of June, 1971, appellant filed a Motion for Stay with this Court which was denied by Mr. Justice Harlan on June 30, 1971. On September 7, 1971, appellant's Jurisdictional Statement was docketed by the Clerk of the United States Supreme Court.

ARGUMENT

I

THIS COURT SHOULD NOT ENTERTAIN AN APPEAL WHICH IS NOT TAKEN IN CONFORMITY TO STATUTE OR TO THE RULES OF THIS COURT

Appellant on the 18th day of June, 1971 filed a Notice of Appeal to this Court stating that the appellant was appealing from the final judgment of Arizona's Court of Appeals, Division I, entered on the 5th day of May, 1971, which denied her Motion for Leave to Appeal Without Prepayment of Filing Fees and also appealing from the final judgment of the Supreme Court of Arizona entered on the 25th day of May, 1971 which refused consideration of her Petition for Review. Her Appeal is purportedly taken pursuant to 28 U.S.C. § 1257(2). However, this

provision explicitly requires that there be a judgment rendered by the highest Court of the State in which a decision could be had and that judgment be final.

In Market Street R. Co. v. Comm'n., 324 U.S. 548 (1945), this Court stated:

> "Our jurisdiction to review a state court judgment is confined by long-standing statute to one which is final....Final it must be in two senses; it must be subject to no further review or correction in any other state tribunal, it must also be final as an effective determination of the litigation and not of merely interlocuting or intermediate steps therein. It must be the final word of a final court." at p. 551.

Here, appellants are not appealing from a final judgment within the meaning of Market Street R. Co. v. Comm'n, id. The May 5, 1971 purported judgment is a letter from one member of the Arizona

Court of Appeals. This is not judgment, decree, order or opinion. If somehow this letter can be construed as a judgment or decree it was not final because it was subject to review by the Supreme Court of Arizona. Rule 47, Rules of the Supreme Court, Volume 17, Arizona Revised Statutes, Pocket Part, p. 51. Further, it was not determinative of the entire cause.

The May 25, 1971 order on its face indicates it is not the final word of the Supreme Court of Arizona for the reason that the merits were not considered and that a Special Action would be entertained. /See Appendix F of the Appellant's Jurisdictional Statement/.

Furthermore, appellant alleges in her Jurisdictional Statement that she is ap-

pealing from not only the two previous matters mentioned, but also from the Order of the Supreme Court of Arizona filed and entered on June 9, 1971 which was not designated in her Notice of Appeal. It is interesting to note appellant could have designated this Order in her June 18, 1971 Notice of Appeal but failed to do so. Rule 10, Rules of the Supreme Court requires that the Notice of Appeal shall designate the judgment appealed from. This was not done and the omission is fatal.

Further, this appeal was not docketed within the time prescribed by Rule 13, Rules of the U. S. Supreme Court. Appeals to this Court must be docketed within 90 days. 28 U.S.C. § 2101(c).

Ninety days from the Arizona Supreme Court's May 25, 1971 minute entry would be August 23, 1971. Ninety days from Judge Haire's letter of May 5, 1971 would be August 3, 1971. Since this appeal was docketed on September 7, 1971, it is untimely and should be dismissed. Shapiro v. Doe, 396 U.S. 488 (1970), Rule 13, Rules of the Supreme Court.

II

THIS APPEAL SHOULD BE DISMISSED BECAUSE THE FEDERAL QUESTIONS SOUGHT TO BE RAISED WERE NOT TIMELY AND PROPERLY RAISED

The first time appellant raised a federal question in this case was in her Motion for Rehearing. /See Appendix D of Appellant's Jurisdictional Statement/. Prior to this Motion, appellant moved in the Court of Appeals of Arizona for waiver

of the filing fees and at that time was required to raise her federal question. /See Appendix B of Appellant's Jurisdictional Statement/. She failed to do so in spite of the fact that she was fully aware of the provisions of A.R.S. § 12-321 and Boddie v. Connecticut, 401 U.S. 371 (1971). Assuming, arguendo, Judge Haire's letter of May 5, 1971 is a final judgment within the meaning of 28 U.S.C. § 1257.[1] Having failed to raise the federal question as to the claimed constitutional infirmity of A.R.S. § 12-321 until their Motion for Rehearing of April 30, 1971 it is too late to preserve the

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[1] In Burns v. Ohio, 360 U.S. 252 this Court construed a letter from the Clerk of the State Court to the appellant refusing to docket his appeal as being a judgment of the State Court.

federal issue for this Court on appeal. Herndon v. Georgia, 295 U.S. 441 (1935). Further, the Court of Appeals correctly declined to consider the federal question. Herndon v. Georgia, supra.

III

THE QUESTIONS PRESENTED ARE UNSUBSTANTIAL AND JURISDICTION SHOULD NOT BE NOTED

Jurisdiction should not be noted on appeals when the questions presented are unsubstantial in light of previous decisions. City of Boston v. Jackson, 260 U.S. 309 (1922); Missouri Pacific Railroad Co. v. Castle, 224 U.S. 541 (1912). This Court's recent decisions are dispositive of the appellant's issues.

Appellant's Jurisdictional Statement and supporting documents make no showing that she is likely to succeed on the

merits of this appeal. Indeed, the Court during the October 1970 Term had ample opportunity to extend the holding of Boddie v. Connecticut, 401 U.S. 371 (1971) but refused to do so. For example, In re Garland, No. 5971, decided May 3, 1971 involved the right of a bankrupt to file a petition for discharge in bankruptcy without payment of the fifty dollar statutory fee. Review was denied. Similarly, in Meltzer v. Lecraw , October Term 1970, No. 5048, decided May 3, 1971, this Court denied review to an indigent tenant challenging a state statute that made him liable for double rents during the pendency of the eviction action if he was ultimately unsuccessful. Finally, in Bourbeau v. Lancaster, No. 5054, decided also on May 3, 1971, an indigent who lost a civil suit

and who could not afford to pay the fees for docketing an appeal was denied review. This latter case is dispositive of the present matter.[2/] By the Court's action in the foregoing cases, the scope of Boddie, supra, has been limited to divorce actions. Further, the rationale in Boddie involved fundamental rights deeply rooted in our society, that being the marriage relationship and the State's monopolization of the means for dissolving that relationship. At most, welfare assistance is a statutory privilege which at any time

2/ Frederick v. Schwartz, No. 5050, decided on May 3, 1971 although not in point was remanded for reconsideration in light of the Court's holding in Boddie, supra. This case involved payment of a fee of seven dollars prior to the filing for review of an administrative decision to the Connecticut Courts. This decision is by no means an expansion of Boddie, supra.

can be legislated away. This type of interest does not rise to the dignity of being "fundamental" and lacking this the Boddie rationale is inapposite. Therefore, the alleged rights asserted herein by appellant are not embraced within the rationale of Boddie. Thus, there being no violation of federally protected Due Process or Equal Protection rights, this appeal should be denied.

CONCLUSION

The law is clear. For the reasons stated this appeal should be dismissed or in the alternative the proceedings of the Courts below should be affirmed.

DATED: September 1971

Respectfully submitted,

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